NO. 44022-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH NEWTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. The State presented insufficient evidence that Mr. Newton both unlawfully entered his mother's room and intended to commit a crime therein.

a. The evidence was insufficient to prove unlawful entry beyond a reasonable doubt.

The State improperly alleges that trial counsel "conceded" unlawful entry in closing argument. *See* Resp. Br. at 6. Trial counsel specifically argued the evidence showed Ms. Williams gave her son permission to enter through the window when he appeared at her home. IV RP 495-96. Trial counsel also argued that even if the jury found criminal trespass (a lesser included instruction was provided), it could not find burglary unless there was evidence beyond a reasonable doubt of intent to commit a crime therein. *E.g.*, IV RP 480, 483. Trial counsel's argument to the jury does not absolve the insufficiencies in the State's evidence at trial.

The State further argues without support that "both occupants [Ms. Williams and Ms. Cooper] had refused [Mr. Newton] entry" at "the door" to Ms. Cooper's home. Resp. Br. at 7. There was no evidence at trial that Ms. Williams denied Mr. Newton entry at any point or place once he arrived at the home. *See* IV RP 411-12 (neighbor testified he did not hear anyone respond to Newton knocking

on door). Although Officer Hannity testified Ms. Cooper told him she had denied Mr. Newton entry, testimony Ms. Cooper contradicted at trial, no witness testified Ms. Williams denied Mr. Newton entry once he arrived at her home. *Compare* III RP 302-03, 375 *with* III RP 252-53, 258-59, 265.

The State also misrepresents Ms. Williams's testimony as to what she told Mr. Newton when he appeared at her bedroom window. Resp. Br. at 3, 7. The State argues Ms. Williams told Mr. Newton "she was not going to open the window." Resp. Br. at 3. But this selective editing is misleading. Ms. Williams could not open the window herself because her disability prevented her from getting up out of her bed to do so. She testified, "he asked me could I open the window, and I told him, no, I was in bed, and there was no way that I could open the window . . . [because] I was in bed." II RP 65. She continued, "I let [Mr. Newton] know to open the window if he wanted to come in because I couldn't get out of bed to do that." II RP 66. The fact that Ms. Williams literally could not open the window herself to let her son in does not mean that she denied him entry. To the contrary, as she testified, she told Mr. Newton he could open the window himself and come into her bedroom.

Furthermore, contrary to the State's argument, the evidence does not support the revocation of a prior license to remain. Resp. Br. at 7-8. In *State v. Gohl*, the evidence showed the victim explicitly denied the defendant entry on the night in question. 109 Wn. App. 817, 820, 37 P.3d 293 (2001). Here, on the other hand, Mr. Newton had blanket permission to enter Ms. Williams and Ms. Cooper's home, he did so regularly, and there was no evidence Ms. Williams denied him entry when he appeared at her window. II RP 99-101; III RP 265.

The evidence here is also distinguishable from that presented in *State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998), also relied on by the State. Resp. Br. at 8-9. In that case, the State proved that the occupant of the apartment explicitly told the defendant to leave, revoking any prior license to enter. *Davis*, 90 Wn. App. at 779, 781. Unlike here, the State presented sufficient evidence of unlawful entry or remaining in *Davis*. The *Davis* court did not even consider the argument that the State appears to make here—an implied revocation of a license to enter. *Id.* at 781 n.6.

As the only occupant of her bedroom, Ms. Williams could grant her son permission to enter. *State v. Schneider*, 35 Wn. App. 237, 241, 673 P.2d 200 (1983). Her disability prevented her from opening the

front door or window for Mr. Newton. But the evidence did not show that she denied him entry when he showed up at her bedroom window in the middle of the night.

b. The State's evidence was likewise insufficient to show beyond a reasonable doubt that Mr. Newton intended to commit a crime when he entered his mother's bedroom to help her understand that she could walk again.

As set forth in the opening brief, the State also failed to prove Mr. Newton entered his mother's room with intent to commit a crime against person or property in the building. RCW 9A.52.020(1); *State v. Bergeron*, 105 Wn.2d 1, 4, 16-17, 711 P.2d 1000 (1985); Op. Br. at 11-14. The State argues in response that "the defendant knew that Ms. Williams, his mother, could not walk or get out of bed without assistance." Resp. Br. at 10. Therefore according to the State, it presented sufficient evidence of intent to assault. But, in fact, the evidence showed the precise opposite—Mr. Newton firmly believed Ms. Williams could finally walk again. *E.g.*, II RP 62-66, 78, 98-99, 105, 210. He entered her room to show that to her, not to assault her. *See, e.g.*, II RP 62-66 (Newton's conduct consistent with that purpose throughout). He did not enter or remain to assault her; he believed she could walk on her own.

c. The insufficient evidence of each element requires reversal and dismissal with prejudice.

As discussed, the State failed to meet its burden on two elements of the burglary charge—intent to commit a crime therein and unlawful entry—each insufficiency independently requires reversal of the conviction and dismissal of the charge. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. By instructing the jury that it could infer intent to commit a crime from unlawful entry where that inference was not more likely than not, the court denied Mr. Newton his constitutional right to due process.

Inferences are disfavored in criminal law because they can easily reduce the State's constitutionally-required burden of proof. *E.g.*, *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006); *State v. Sandoval*, 123 Wn. App. 1, 4-5, 94 P.3d 323 (2004). Further, "intent may not be inferred from conduct that is patently equivocal." *State v.Bergeron*, 38 Wn. App. 416, 419, 685 P.2d 648 (1984), *aff'd* 105 Wn.2d 1. Thus, a jury cannot be instructed that a person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein unless the State proves the intent more likely than not flows from proof of the illegal entry and the inference would not be the sole proof of the intent

to commit a crime therein element. *State v. Brunson*, 128 Wn.2d 98, 107-08, 905 P.2d 346 (1995).

Notably, in its response, the State does not argue that the former prerequisite was satisfied here—that the State proved intent to commit assault more likely than not flows from any proof of illegal entry here. *See* Resp. Br. at 11-12. Nor could the State credibly argue that intent to commit assault more likely than not flowed from Mr. Newton's alleged unlawful entry. At most, the evidence barely indicates Mr. Newton's entry was indeed unlawful. *See* Section A.1, *supra*. Moreover, unlike in *State v. Bergeron*, Mr. Newton did not carry with him any tools to effectuate a crime against a person or property inside his mother's home and his clothing and appearance did not indicate any criminal purpose. 105 Wn.2d at 4, 11-12, 16-17. Nothing about Mr. Newton's entry indicated that he "more likely than not" intended to commit a crime in his mother's home. Moreover, when Mr. Newton entered, he immediately tried to convince his mother that she could walk on her own. He did not assault her, maliciously break property, or act in any other manner consistent with intent to commit a crime. Accordingly, the trial court erred in presenting a permissive inference instruction to the jury. *See* CP 29; IV RP 437-46, 449.

To support the second prerequisite to the inference instruction—that the inference would not be the sole proof of the intent to commit a crime therein element—the State again argues that Mr. Newton knew that Ms. Williams could not walk or get out of bed without assistance and thus intended to assault her. Resp. Br. at 12 (referencing prior argument). However, as set forth above, Mr. Newton did not set out to assault his mother by forcing her to move when she could not. He believed she could move and that he would not need to assault her or otherwise force movement. The State presented no evidence to the contrary.

Because the court violated Mr. Newton's right to due process when it provided the permissive inference instruction, the burglary conviction should be reversed and remanded for a new trial. *See Sandoval*, 123 Wn. App. at 6.

3. As the State recognizes, the deputy prosecutor's arguments were improper; this Court should reverse on that basis.

In direct contravention of this Court's holding in *Wright*, the deputy prosecutor argued to the jury that in order to believe witnesses favorable to the defense the jury would have to find the State's police officer witness "is lying." IV RP 467; *State v. Wright*, 76 Wn. App.

811, 826 & n.13, 888 P.2d 1214 (1995); *accord* IV RP 506 (questioning whether police officer told the truth), 508 ("evidence . . . show[s defense-friendly witnesses] are liars"); Exhibit 36, p.6 ("Is every [State's witness lying] except for the new versions provided by Cathy Cooper and Volinda Williams?").

The deputy prosecutor committed further misconduct by bolstering the credibility of Officer Hannity through redirect examination of a fellow police officer and then relying on that improper "evidence" and otherwise bolstering Officer Hannity's credibility in her closing remarks to the jury. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) ("[I]t is generally improper for prosecutors to bolster a police witness's good character even if the record supports such argument."); *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (misconduct for prosecutor to seek testimony whether another witness is telling the truth). On redirect, the deputy prosecutor elicited testimony that "Officer Hannity writes . . . phenomenal reports. He is one of the best report writing officers in the department." II RP 180. In other words, the prosecutor argued that the jury should believe the truth of Officer Hannity's report of the incident instead of Cathy Cooper and Volinda Williams's lies. Like in *Wright, State v.*

Casteneda–Perez, and *State v. Walden*, this line of questioning was improper because it invades the province of the jury in determining credibility, "places irrelevant information before the jury and potentially prejudices the defendant." *Wright*, 76 Wn. App. at 821-22; *State v. Walden*, 69 Wn. App. 183, 847 P.2d 956 (1993); *State v. Casteneda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74 (1991).

The deputy prosecutor then expounded on the improper testimony in closing, discussing Officer Hannity's "meticulousness," "polite[ness]," "candidness," and "how he made a point not to exaggerate." IV RP 467, 476-77. She went so far as to ask, "Do you believe that Officer Hannity is going to place his career on the line to put something in his report and document it when it didn't actually happen? He is, obviously, not going to do that." IV RP 467. Such argument is misconduct that cannot be cured by an instruction. *State v. Heaton*, 149 Wash. 452, 271 P. 89 (1928) (prosecutor's statement that he had worked with police witnesses for a long time a knew their character "transcended the bounds of legitimate argument and amounted to an attempt on the part of counsel to testify as to the witnesses' good character").

In fact, the jury did not need to find that Officer Hannity purposefully put something in his report that did not happen; the jury only needed to entertain a reasonable doubt that Mr. Newton committed burglary and resisted arrest. *See Wright*, 76 Wn. App. at 824 (discussing *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991)). Further, the jury did not need to resolve a conflict between Officer Hannity (or the prosecution-favorable witnesses generally), and the testimony of Volinda Williams and Cathy Cooper. *See Wright*, 76 Wn. App. at 826; *State v. McKenzie*, 157 Wn.2d 44,59-60, 134 P.3d 221 (2006). Rather, the jury could believe Officer Hannity that Ms. Williams and Ms. Cooper initially told Mr. Newton not to come into the home but also believe Ms. Williams that she subsequently gave Mr. Newton permission to enter through her bedroom window. By focusing on the truthfulness of Officer Hannity and the lies of the defense-friendly witnesses, the deputy prosecutor gave the jury the false impression that it needed to determine the police were lying in order to acquit Mr. Newton. Moreover, the deputy prosecutor in no way spoke to potential mistakes—she discussed lies versus the truth. *See Wright*, 76 Wn. App. at 826; *see, e.g.*, IV RP 466 (Williams changed story to help Newton; "motive to lie"), 467-77 (Cooper

changed story; "motive to lie"; officer not lying), 476-77 (officer not lying), 478 (same), 505-06 (question is which witnesses are lying), 508 (defense-friendly witnesses are liars). The misconduct requires reversal.

4. In the alternative, reversal is required due to the cumulative effect of these several errors.

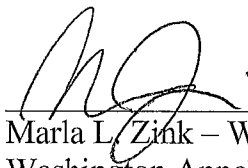
As set forth in Mr. Newton's opening brief, even if the Court does not agree that one or more of the above errors requires reversal, the cumulative effect of the errors denied Mr. Newton a fundamentally fair trial. On that independent basis, the convictions should be reversed.

B. CONCLUSION

As set forth herein and in Mr. Newton's opening brief, the burglary conviction should be reversed and the charge dismissed because the State failed to prove both that he intended to commit a crime when he entered his mother's room to inform her she could walk again and that his entry was unlawful. If the Court disagrees, the matter should be remanded for a new trial because the trial court improperly provided an inference instruction, the prosecutor committed misconduct and cumulative error denied Mr. Newton a fair trial.

DATED this 5th day of August, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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	)	
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Seattle, Washington 98101
(206) 587-2711

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